TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 391.

THE HOUSTON DIRECT NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES GAGE AND EDWARD E. PARKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED NOVEMBER 21, 1871.

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1 In the circuit court of the United States for the eastern district of Texas, in the 5th circuit.

Be it remembered that in the suit lately pending in said court, numbered on the docket thereof No. 430, wherein Charles Gage and Edward E. Parker were plaintiffs and The Houston Direct Navigation Company were defendants, the proceedings were had therein in and by said court, in words and figures following, to wit:

Petition.—Filed Oct. 24th, 1870.

Circuit court of the United States for the circuit and for the eastern district of Texas, December term, 1870, Oct. 24th, 1870.

To the hon. the judges of the circuit court of the United States for the eastern district of Texas, sitting at Galveston:

Your petitioners, Charles Gage, who is a resident citizen of the State of Massachusetts, and Edward E. Parker, who is a resident citizen of the State of Maine, and who are partners and transacting business in the city of Galveston, in the State of Texas, under the firm-name and style of Gage & Parker, and who are hereinafter styled plaintiffs, complain of "The Houston Direct Navigation Company," who are citi-
2 zens of the State of Texas, incorporated by that name by said State of Texas, and having their principal place of business therein in the city of Houston and county of Harris, within said eastern district of Texas, and within the jurisdiction of said court.

The said "The Houston Direct Navigation Company" is a corporation legally incorporated by the State of Texes, by an act of the legislature thereof, styled "An act to incorporate The Houston Direct Navigation Company, passed October 9th, 1866," and John Shearn, who is a resident citizen of the State of Texas, residing at said city of Houston, within said district of eastern Texas, is the president of said corporation, and R. Green, jr., also a resident citizen of the State of Texas, and residing at said city of Houston, within said district, is the secretary & treasurer of said corporation. The said "The Houston Direct Navigation Company" is hereinafter styled defendant.

The said plaintiffs represent that the said defendant, before and at the time of making of his promise hereinafter mentioned, was a common carrier of goods and chattels, wares, and merchandise for hire, in
3 and by sundry steamers and barges, including the steamer "J. Whitelaw" and the barge "Galveston," from the city of Galveston, in the State of Texas, to the city of Houston, in the State of Texas, both of which cities are within the said eastern district of Texas, and the said defendant, before and at the time of the making of his promise hereinafter mentioned, was a common carrier of goods, wares, and merchandise for hire, within the State of Texas, in boats and barges and steamers on the waters entirely within the body of this State.

And the said defendant being such common carrier for hire, as aforesaid, the said plaintiffs heretofore, to wit, on the 26th day of July, 1870, and on the 27th day of July, 1870, at the said city of Galveston, at the special instance and request of said defendant, so being such common carrier as aforesaid, at the city of Galveston aforesaid, certain goods, chattels, and merchandise, to wit, a barge-load of ice, to wit, (135 tons,) one hundred and thirty-five tons of ice, of the said plaintiffs, of great value, to wit, of the value of eighty dollars per ton, of the total

4 value of ten thousand eight hundred dollars of lawful money of the United States of America, to be taken care of, and safely and securely carried and conveyed by the said defendant as such common carrier as aforesaid, in and by the said barge "Galveston," from the said city of Houston, to be safely and securely delivered by the said defendant for the said plaintiffs; and in consideration thereof and of a certain reward of three hundred dollars to the said defendant, he, the said defendant, being such common carrier as aforesaid, then and there, to wit, on the days and year aforesaid, at the said city of Galveston, undertook and faithfully promised the plaintiffs to take care of said ice, and safely and securely to carry the same, and safely and securely convey the same in and by said barge "Galveston," from said city of Galveston to said city of Houston, and there, to wit, at said city of Houston, safely and securely to deliver the same for the said plaintiff.

And although the said defendant, as such common carrier as
5 aforesaid, at the said city of Galveston, had and received the ice aforesaid for the purpose aforesaid, yet the said defendant, not regarding his duty as such common carrier, nor his said promise and undertaking made so as aforesaid, but contriving and fraudulently intending, craftily and subtly, to deceive and injure the said plaintiffs in this behalf, hath not taken care of the said ice, or safely or securely carried or conveyed the same from the said city of Galveston to the said city of Houston, nor hath, at the said city of Houston, safely or securely delivered the same for the said plaintiffs; but, on the contrary thereof, he, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself with respect to said ice that by and through the carelessness, negligence, and improper conduct of said defendant and his servants in this behalf a large part of said ice, to wit, ninety-five tons of said ice, being of the value of seven thousand six hundred dollars, afterwards, to wit, on the days and year aforesaid, at and near the city of Galveston aforesaid, and before its arrival at said city of Houston,
6 became and was wholly lost to said plaintiffs, partly at said city of Galveston and partly in its transit towards said city of Houston.

And on the said 26th & 27th days of July, 1870, the said defendants, at the said city of Galveston, in consideration that the said defendant, at his special instance and request, then had the care and custody of the aforesaid ice of the plaintiffs of the value of ten thousand eight hundred dollars as aforesaid, he, the said defendant, undertook, and then and there faithfully promised the said plaintiff, to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiffs in this behalf, whilst the said defendant so had the care and custody of said ice, took so little and such bad and improper care thereof that the same, afterwards, to wit, on the days and year aforesaid, at said city of Galveston partly, and partly in
7 transitu between said cities of Galveston and Houston, became and was greatly damaged, and ninety-five tons thereof were wholly lost to the plaintiffs.

And, on the said 26th of July, 1870, at the said city of Galveston, before the plaintiffs delivered any of said ice to said defendant, the said defendant promised that, in consideration of the said sum of three hundred dollars, freight, and in consideration that the plaintiffs would deliver said ice to defendants, as common carriers, to be carried from said

city of Galveston to said city of Houston, he, the said defendant, would furnish some tarpaulins to cover the ice, but which said promise the defendant then and there wholly failed to observe and perform, and wholly failed to furnish any tarpaulins, or any other covering for said ice; and, by reason of the failure of said defendant to furnish some tarpaulins to cover said ice, ninety-five tons of said ice were lost as aforesaid, after its said delivery as aforesaid to said defendants at the time and place aforesaid.

The said plaintiffs, therefore, represent that they have been
8 damaged as aforesaid by the said defendants in the sum of seven thousand six hundred dollars, and therefore bring this suit; and pray for the necessary citation to said defendant, to be served on the said president or secretary & treasurer of said corporation, requiring said defendant to appear and answer hereto at the next term of said court, and that the said plaintiff may have judgment against said defendant for the said sum of seven thousand six hundred dollars damages, and for costs of suit.

CHARLES GAGE,
EDWARD E. PARKER,
By SPENCER & STEWART,
Att'ys for Plaintiffs.

Citation.—Issued Oct. 28, 1870.

United States circuit court.

The President of the United States of America to the marshal of the eastern dist. Texas, greeting:

You are hereby commanded to summon The Houston Direct Navigation Company, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term
9 thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the fifth day of December next, to answer the petition of Charles Gage and Edward E. Parker against said company, in an action to recover damages in the sum of $7,600.00, as alleged in the petition, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not, and due return of this writ make.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Galveston, this 28th day of October, in the year of our Lord eighteen hundred and seventy, and of American Independence the ninety-fifth year.

[SEAL.]

LEVI JONES,
Clerk Eastern District, Texas, at Galveston.

Marshal's return.

Received this writ on the 18th day of November, 1870, and I executed the same on the 18th day of November, 1870, by delivering to John Shearn, pres't of the Houston Direct Navigation Company, in
10 person, a true copy of this writ, and a copy of the petition certified by the clerk of this court.

W'M E. PARKER,
U. S. M., E. Dist., Tex.,
P'r A. B. HALL, *Dep't.*

Demurrer & answer.—Filed Dec. 8th, 1870.

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY.

Suit pending in the circuit court of the United States for the eastern district of Texas. December term, A. D. 1870.

And now, at this term of the court, comes the said defendant, and except to the plaintiffs' petition in this cause, and says that the same is not sufficient in law; and of this prays judgment of the court.

WILLIE & CROSBY,
Att'ys for Def't.

And, further answering in this behalf, defendant denies all and singular the allegations of plaintiffs' petition, and say' that the same are not true in manner and form as therein alleged. And of this puts itself upon the country.

WILLIE & CROSBY,
Att'ys for Def't.

11 *From the minutes, Dec'r term, Dec'r 12th, 1870.*

GAGE & PARKER
v.
THE HOUSTON DIRECT NAVIGATION COMPANY. } 430.

On motion of A. H. Willie, of counsel for def't, he has leave to amend.

Amended answer.—Filed Jan'y 3d, 1871.

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY.

In circuit court of the United States for the eastern district of Texas, at Galveston. December term, A. D., 1870.

And now comes the said company, defendant, as above stated, and, by leave of the court, amending its answer, says, in addition to the defences already pleaded herein, that it is not true that defendant made with said plaintiff any such contract as is set up in their petition, but, on the contrary, defendant says that if it ever entered into any contract with plaintiff in and about the transportation of said ice it was by the terms of said contract expressly agreed and understood by and between the parties thereto that said transportation and the car-
12 riage of said ice from the city and port of Galveston to the city of Houston was to be at the sole and exclusive risk of the said plaintiffs, and that this defendant was to be in nowise responsible for the safe carriage or transportation of the same. That at and before the time of the making of said contract it was expressly stated to said plaintiffs, by the officers and agents of this defendant, who were then and there acting in its behalf, that it was and would be unsafe to attempt the transportation of such a cargo by any of the barges belong-

ing to said company, and that said company would not take the risk nor assume the responsibility of such transportation; that the said plaintiffs thereupon agreed that, in consideration that the said defendant would undertake said transportation for the low sum of three hundred dollars, upon one of the barges of defendant, they, the said plaintiffs, would assume, take upon themselves, and be at all the risk of the safe transportation of said ice, and that this defend-
13 ant should in no event be liable for the loss of said ice, or of any part thereof, during the voyage, or during the course of said transportation, but that such loss should fall upon the plaintiffs alone, no matter from what cause the same should arise; that, with this distinct understanding and at the special instance and request of said plaintiffs, defendant chartered and hired to said plaintiffs the said barge Galveston for the transportation of said ice from said city of Galveston to the said city of Houston, all of which occurred at the said city of Galveston on or about the day of July, A. D. 1870; and defendant says that, in pursuance of the aforesaid understanding, the said plaintiffs then and there placed upon and loaded said barge with said ice, the weight of which is and was to this defendant unknown, and said plaintiffs then and there also placed upon said barge certain of their own employees and hired servants to take charge of said ice, and see that it was cared for and protected from loss as far as possible during the said voyage, and that said employees and servants did immediately take charge of said ice, and had the exclusive care
14 and control of the same during the whole of said voyage; and defendant says that if any portion of said cargo was lost during the course of its said transportation by reason of the melting of said ice or otherwise that this defendant is in nowise responsible for the same by the terms of said contract, nor did the same occur by reason of the carelessness and negligence of this defendant, but through the fault and negligence of the plaintiffs themselves.

And further answering, defendant says that, if any loss or damage to the said ice occurred during the time of its said transportation from the city of Galveston to the city of Houston, the same did not occur through any fault, negligence, or carelessness on the part of this defendant; and defendant denies all and every allegation of negligence or carelessness in the transportation of said ice which is laid to its charge in the said petition; and defendant avers that it took all and every care in the transportation of said ice which it was bound to take
15 by the terms of its contract with said plaintiffs for the transportation thereof; and that, if any loss or damage to said ice occurred during said transportation, the same happened from the inherent infirmity of said ice and its natural tendency to decay and melt, and through the neglect of the said plaintiffs themselves; that said ice was laden upon said barge by the said plaintiffs and by their direction, and was stowed to suit themselves, they taking entire and exclusive charge and supervision of said stowage, and directing and controlling the manner in which the said ice should be cared for and protected during its said transportation; and that no employee or agent of this defendant was allowed to exercise any control or supervision over the same at any time during the said voyage; and if any loss or damage occurred to said ice, in the course of said transportation, the same happened whilst said ice was in the exclusive keeping and charge of the plaintiffs, and either by and through the mere negligence & carelessness of
16 said plaintiffs, or through the natural tendency of said ice to melt under exposure to which it was necessarily and unavoidably

subjected during said voyage, and this the said defendant is ready to verify. Wherefore he prays judgment against said plaintiffs.

WILLIE & CROSBY,
Att'ys for Def't.

Demurrer to answer.—Filed January 17, 1871.

Law docket, circuit court of the United States, eastern district of Texas.

GAGE & PARKER
v.
THE HOUSTON DIRECT NAVIGATION COMPANY. } No. 430.

Come the plaintiffs, by their attorneys, and demur and except to the following-named portions of said defendant's answer, to wit: Beginning on the tenth line of the first page of said answer with these words, "it was by the terms of said contract," &c., and ending on the second page of said answer, in the fifteenth line thereof, in these words, "from what cause the same should arise," including everything set up in said answer between said beginning in the tenth line of the first page and said ending in the fifteenth line on the second page of said answer;
17 also, the following portion of said answer, to wit: The words "that, with this distinct understanding," in the fifteenth and sixteenth lines of the second page of said answer; and also in the following words in the twenty-third and twenty-fourth lines of the second page of said answer, to wit: "And defendant says, in pursuance of the aforesaid understanding," and also the following words on the third page of said answer and in the eighth line of said page, to wit, "by the terms of said contract;" and said plaintiffs demurs to all of said named portions of said answer, and says that the same are insufficient in law to bar or preclude them, the said plaintiffs, from maintaining their aforesaid action against defendants; and the plaintiffs are ready to verify, and therefore prays that the same may be stricken from said answer.

SPENCER & STEWART,
Att'ys for Pl'ffs.

Amended answer.—Filed Jan'ry 17th, 1871.

Circuit court of the United States for the eastern district of Texas, at Galveston.

GAGE & PARKER
v.
HOUSTON DIRECT NAV. CO. }

And now comes the said defendant, and, (by leave of the court,) amending its answers heretofore pleaded in this cause, says: That it
18 denies that it ever entered into any such contract with the plaintiffs as is set forth in their petition; but defendant says that the said plaintiffs, at Galveston, on or about the day of July, A. D. 1870, applied to this defendant to transport for them, by water, from the city of Galveston to the city of Houston, Texas, a large quantity of ice upon some of the vessels belonging to defendant, and used by it in the transportation of goods between the two cities aforesaid; that this de-

fendant then and there positively declined to undertake said transportation, or to contract for the carriage of the same over the route aforesaid, for the reason that it possessed no vessel suited to such transportation or capable of carrying said ice with safety, and because it was not the custom or usage of this defendant to carry ice over said route, the same being an article perishable in its nature, and liable to melt and waste to a great degree during the time of such transportation; that thereupon the said plaintiffs proposed to this defendant to hire and charter of and from this defendant the barge Galveston, a vessel
19 then and there the property of this defendant, for the said voyage, and to take and receive the sole and exclusive use and control thereof for the transportation of said ice from the said city of Galveston to the said city of Houston; to load and stow said ice upon the said barge in such manner as they might deem best; to place their own agents and employees in entire control of said barge and its cargo, and to assume the entire responsibility of its care and keeping during said transportation, and of its safe delivery at said city of Houston, at the termination of said voyage, in all respects as if they, the said plaintiffs, were the true and lawful owners of said barge as well as of said cargo during the continuance of said voyage; and then and there and thereby offered to undertake all the responsibilities of said transportation and incur any loss or damage that might accrue to said cargo during the course thereof, and further, expressly offered to pay defendant for any damage or loss to said barge during said voyage. And further, plaintiffs then and there offered, for such exclusive use, control,
20 and possession of said barge during said voyage, and for the further consideration that defendant would tow said barge so as aforesaid to be let, hired, and chartered to plaintiffs, for their exclusive use, occupation, and employment, and the cargo of ice which they might place upon her, from the said city of Galveston to the said city of Houston, behind one of the steamboats of said defendant, they, the said plaintiffs, would pay defendant the sum of three hundred dollars in United States currency, which said sum was not one-half the legal or customary price for the chartering or hire of such barges, for the uses above stated, and was accepted as hereinafter alleged only upon consideration that said barge and cargo should be at the risk of said plaintiffs during said voyage; that said defendant, after having admonished said plaintiffs of the unsuitableness of the said barge for the uses for which they designed it, then and there accepted the aforesaid proposition of the plaintiff', and then and there hired, let, and chartered
21 the said barge to said plaintiffs for the purposes aforesaid, and upon the express terms, conditions, and stipulations above set forth. And the defendant says that, in pursuance of said agreement, the said plaintiffs took immediate possession and control of said barge, loaded ice upon her, to what amount defendant is not informed; stowed the same in such manner as they thought proper, none of defendant's agents or employees interfering with said loading, or being allowed to have anything to do with the stowage of the same; that said barge was then and there attached by a line to the stern of the "Bagby," one of the defendant's steamboats, and was towed in safety and within the time usually allotted to such voyage from the city of Galveston to the city of Houston aforesaid; and that, during the whole course of said voyage, the said barge and her cargo of ice were in the exclusive charge of said plaintiffs and their employees, and any and all damage received or incurred during said voyage was received or incurred either through the carelessness and negligence of said plaintiffs or their em-

22 ployees, or through the inherent tendency of said ice to melt during such voyage. And defendant expressly denies that it ever contracted to transport said ice upon the voyage aforesaid as a common carrier, and defendant says that it was never at any time the custom or usage of this defendant to carry ice from said city of Galveston to said city of Houston, or to any other point at its own risk, but that said article was always transported upon barges chartered and hired by the owners of the ice, and controlled by them under all the conditions and responsibility of a charterer and pro hac vice owner of the vessel at common law, of all which plaintiff then and there had notice, and further denies that any loss or damage occurred to the same during the aforesaid voyage through any negligence or carelessness of this defendant. And defendant denies that it was any part of the aforesaid contract that it was to furnish a tarpaulin to said plaintiffs for the purpose of covering said ice during said voyage as is stated in the petition; but

23 defendant says that if it ever offered a tarpaulin to said plaintiffs for the purposes aforesaid, it was made as a mere loan, and upon condition that it had one to spare.

And further, defendant denies that said ice suffered any more damage during its aforesaid transportation than would naturally occur from the inherent tendency of said ice to melt; and says that no human foresight could have prevented such loss as may have occurred to the same during its aforesaid transportation. Wherefore defendants say that if any damage has occurred to said plaintiffs, by reason of the aforesaid transportation of said ice, the same occurred through the act of God, and the natural infirmity of said article and cargo, and not through any carelessness or negligence of the defendant. And defendant repeats all and singular the averments and denials and prayers of his answers heretofore filed.

WILLIE & CROSBY,
Att'ys for Def't.

Demurrer of plaintiffs.—Filed Jan'y 18th, 1871.

In circuit court United States, eastern district of Texas, Jan'y, 1871.

GAGE & PARKER
v.
THE HOUSTON DIRECT NAV. CO.

24 Come plaintiffs and demur to the following portions of def't's amended answer, filed Jan'y 17, 1871, beginning on the 1st page & 4th line with the words, "but defendant says," &c., down to the words, "and that during," on page fourth (4) of said amended answer, which portion of said amended answer is insufficient in law, and furnishes no defense to the action, and is otherwise inconsistent, repugnant, and insufficient, of which he prays judg't of the court, and that the same be stricken out.

SPENCER & STEWART,
Att'ys for Plaintiffs.

And in case this demurrer is overruled, the plaintiff, by way of replication to said parts of said amended answer, denies the same, and says that the same is not true; and plaintiffs also, by way of replication, deny all the residue of said amended answer, and say the same is not true, and put themselves upon the country, &c.

SPENCER & STEWART,
Att'ys for Plaintiffs.

Order.—From the minutes Dec'r term, 1870, *Jan'y* 18, 1871.

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY. } 430.

25 This day came the plaintiffs, by their attorneys, and defendant, by its attorneys, and thereupon a trial coming on to be had, the plaintiffs' petition was presented and read to the court, to which petition the defendant demurs, and said demurrer being considered by the court, is overruled. Thereupon the answer and amended answer of the said defendant to the plaintiffs' petition was presented and read to the court, to a portion of which said answer the plaintiffs demur, as specified in their demurrer herein filed. And thereupon the said demurrer was argued by the counsel before the court, and submitted for its consideration.

Order.—From the minutes Dec'r term, Jan'y 19th, 1871.

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION CO. } 430.

On this day again came the parties to this suit, by their attorneys, and the plaintiffs' demurrer to portions of the defendant's answer, argued before the court on yesterday, having now been fully considered, and it appearing to the court that the law is for the plaintiffs, it is ordered that said demurrer be sustained; to which ruling of the
26 court the said defendant excepts, and takes leave by permission of the court to amend.

Amended answer.—Filed Jan'y 19, 1871.

GAGE & PARKER.
v.
HOUSTON DIRECT NAVIGATION COMPANY. }

Suit pending in the U. S. circuit court for the eastern district of Texas, at Galveston.

And now comes the said defendant, and, by leave of the court, amends its answer heretofore filed in this cause, and says that if the said defendants ever undertook to transport any ice for the said plaintiffs, as alleged in their petition, the same was with the consent of the said plaintiffs, then and there expressly given, to be stowed by said plaintiffs and their employees upon a barge of this defendant called the Galveston, and transported upon such barge from the city of Galveston to the city of Houston, upon deck; and that then and there and thereby it was agreed between the said plaintiffs and this defendant, that defendant should be liable for loss or damage to said ice in the same manner and to the same extent that common carriers are liable
27 for loss or damage to goods which are, with the consent of the owner, stowed upon the deck, at common law. And defendant says that, if any loss occurred to said ice, the same occurred through

their exposure to weather upon deck, being placed there by plaintiffs, and the natural tendency of the same to decay, without any negligence or carelessness on the part of this defendant. And this it is ready to verify.

And, further, defendant says that, at and before the delivery of said ice to this defendant by said plaintiff for transportation as aforesaid, it was expressly stated by this defendant to the said plaintiff that this defendant had no vessel capable of carrying such character of goods in safety, and because said goods were not of a kind usually carried upon its vessels; and said defendant then and there refused to transport said ice from the said city of Galveston to the city of Houston, and rejected the offer of plaintiffs to place the same on board of any of its vessels for transportation; that said plaintiffs then and there agreed to hire and charter from defendant the said barge Galveston, for the sum of
28 three hundred dollars, to take the sole and exclusive charge of said barge, to store said ice upon her, and put the same and the barge in the charge and under the control of the employees of said plaintiffs, and to pay to defendants the value of said barge in case she should be lost from any cause whatever during said voyage and in the course of said transportation; and that plaintiffs then and there well knew that, in loading said barge with the cargo aforesaid, the same would necessarily be loaded as goods usually are when placed upon the deck of vessels, and consented that the same should be thus loaded, and defendant then and there accepted said offer of chartering; and that the said plaintiffs then and there loaded said barge with the ice aforesaid by themselves and their employees, and took exclusive management of said barge and her said cargo, and did not, during said voyage, permit or allow defendant or its agents to have any control of the same; refused to receive from defendant a tarpaulin to cover said ice, and
29 would not allow the same to be used; and defendant says that, if any loss occurred to said cargo of ice during the aforesaid transportation, the same occurred through the mere carelessness & negligence of the said plaintiffs whilst in the exclusive charge of the same and from the inefficient & careless manner in which the same was put up and stowed by the said plaintiffs, and that no loss or damage occurred to the same during the time aforesaid through any fault or negligence for which this defendant was liable under the facts hereinbefore set forth. And this defendant is ready to verify; wherefore he prays judgment, &c.

WILLIE & CROSBY,
Atty's for Def't.

And further answering, defendant denies that the number of pounds of ice set forth in plaintiffs' petition was ever delivered to this defendant for transportation at any time from said city of Galveston to said city of Houston, and denies that any of the same was lost during said transportation; says that the same was in a rotten and defective state when delivered to defendant for transportation, badly put up for said voyage, and that all of the loss which may have occurred to said
30 ice during said voyage occurred from the inherent defects of the same and of the manner in which the same was put up and stowed, and not through any carelessness or negligence on the part of this defendant.

WILLIE & CROSBY,
Atty's for Def't.

Replication.—Filed Jan'y 19th, 1871.

Circuit court of the United States, eastern district of Texas.

GAGE & PARKER
vs.
THE HOUSTON DIRECT NAVIGATION COMPANY. } No. 430. Law docket.

And now comes the plaintiffs in the above numbered and entitled cause, by their attorneys, and for replication deny all and singular the allegations contained in defendant's answer and amended answers, and says the same are untrue.

SPENCER & STEWART,
Atty's for Pl't'ffs.

Instructions asked for by defendants.—Filed Jan'y 20, 1871.

GAGE & PARKER
v.
H. D. NAV. CO. } Charges asked for def't.

Defendant's counsel ask the court to charge the jury that, if the owners of the ice specially undertook to watch the goods, and sent his own servant with the ice, no liability attached to the defendant.

31 That if the ice was stored upon the deck of the barge by plaintiffs, or with their consent, the defendants are not liable for any loss that accrued by reason of the ice being thus stowed.

That if the open structure of the barge was well known to the plaintiffs at the time they delivered it on board it creates an implied exception in favor of the carrier, & he is not liable to answer for damage created & caused by rain.

WILLIE & CROSBY,
Atty's for Def't.

Endorsed on back of foregoing thus: "These instructions are refused.
"J. C. C. WINCH, *U. S. Judge, &c.*"

Judgment.—From the minutes, December term, 1870, Jan'y 20, 1871.

GAGE & PARKER,
v.
HOUSTON DIRECT NAVIGATION CO. } 430.

On this day again came the parties to this suit, by their attorneys, and thereupon came a jury of good and lawful men, to wit, Deidrich Stubbeman, Herman Nitsche, Henry Woener, Paul Walnetzek, Louis Miller, E. A. Groot, Sam. Maas, John Hannay, J. W. Lang, Hiram Close, N. Elbert, and Thomas McLean, who, being duly tried, impannelled,

32 and sworn, and having heard the evidence, argument of counsel, and charge of the court, after due deliberation for verdict, say:

"We, the jury, find for the plaintiff four thousand and eighty dollars, currency, $4,080.00.

"J. HANNAY, *Foreman.*"

Wherefore, it is considered, adjudged, and decreed by the court that the plaintiffs herein, Charles Gage and Edward E. Parker, do have and

and recover of and from the defendant herein, the Houston Direct Navigation Company, the said sum of four thousand and eighty dollars, in United States currency, as by the verdict of the jury aforesaid assessed; also all costs about this suit sustained; for which judgment and costs let execution issue.

Motion for new trial.—Filed Jan'y 21st, 1871.

In circuit court of United States for eastern district of Texas. December term, A. D. 1870, January 21, 1871.

GAGE & PARKER,
v.
HOUSTON DIRECT NAVIGATION COMPANY.

And now comes the defendant in the above-entitled cause and moves the court to grant it a new trial therein for the following reasons:

1. Because the court erred in sustaining plaintiff's exceptions
33 to defendants' first and second amended answers, and defendants were thereby deprived of the privilege of introducing testimony under the portions of said answers which were thus excepted to.

2. Because the court erred in its charge to the jury.

3. Because the court erred in charging the jury that, under the circumstances of this case, the defendant was liable for all losses occurring to the ice which did not occur through the act of God or the public enemy.

4. Because the court erred in refusing the charges asked by the defendant.

5. Because the jury found contrary to the law of the case.

6. Because the jury found contrary to the evidence.

7. Because the verdict of the jury is unsupported by the evidence.

8. Because the verdict of the jury was excessive, and the amount of damages found by them is far beyond that proved upon the trial.

9. Because the jury neglected, through inadvertance, to make proper calculation as to the amount of ice lost during the voyage.

34. 10. Because the verdict was against the law, evidence, & charge of the court.

WILLIE & CROSBY,
Atty's for Def't.

Order.—From the minutes, December term, 1870, *Feb'y* 9, 1871.

GAGE & PARKER,
v.
HOUSTON DIRECT NAVIGATION CO. } 430.

This day came the parties to this suit, by their attorneys, and thereupon came on to be heard the motion of the defendant herein for a new trial in this case. The same having been argued by counsel before the court, the order of the court thereon is postponed until such time as the same shall have been fully considered.

Order.—From the minutes, December term, 1870, *Feb'y* 10, 1871.

GAGE & PARKER,
v.
HOUSTON DIRECT NAVIGATION CO. } 430.

On this day again came the parties to this suit, by their attorneys,

and the court having now fully considered the motion of the defendant herein for a new trial in this case, argued before the court on yesterday, it is ordered that the said motion be overruled and a new
35 trial be not granted. Whereupon the defendant, by its counsel, gave notice of appeal in open court.

Bill of exceptions No. 1.—*Filed Feb'y* 17, 1871.

Bill of exceptions No. 1.

In the circuit court of the United States for the eastern district of Texas. December term, at Galveston, 1859.

CHARLES GAGE & EDWARD E. PARKER
vs.
HOUSTON DIRECT NAVIGATION COMPANY. } No. 430.

Be it remembered that, on the trial of this cause, the plaintiff demurred to a portion of defendant's plea and answer, which demurrer is as follows:

Circuit court of the United States, eastern district of Texas.

GAGE & PARKER
vs.
THE HOUSTON DIRECT NAVIGATION COMPANY. } No. 430. Law docket.

Come the plaintiffs, by their attorneys, and demur and except to the following-named portions of said defendant's answer, to wit: Beginning in the tenth line of the first page of said answer, with these words, "it was by the terms of said contract," and ending in second page of said answer, in the fifteenth line theref, in these words, "from
36 what cause the same should arise," including everything set up in said answer between said beginning in the tenth line of the first page and ending in the fifteenth line on the second page of said answer; also, to the following portion of said answer, to wit: The words, "that, with this distinct understanding," in the fifteenth and sixteenth lines of the second page of said answer, and also the following words in the twenty-third and twenty-fourth lines of the second page of said answer, to wit, "And defendant says, in pursuance of the aforesaid understanding;" and also the following words on the third page of said answer, and in the eighth line of said page, to wit, "by the terms of said contract." And said plaintiffs demur to all said-named portions of said-named answer, and says that the same are insufficient in law to bar or preclude them, the said plaintiffs, from maintaining their aforesaid action against defendants, and the said plaintiffs are ready to verify, and therefore prays that the same may be stri'ken from said answer.

SPENCER & STEWART,
Attorneys for Defendants.

Which said answer thus in part excepted to read as follows:

37 In the circuit court of the United States for the eastern district of Texas, at Galveston. December term, A. D. 1870.

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY. }

And now comes the said company, defendant as above stated, and, by

leave of the court, amending its answer, says, in addition to the defenses already pleaded herein, that it is not true that defendant made with said plaintiff any such contract as is set up in their petition, but, on the contrary, def't says that if it ever entered into any contract with plaintiffs in and about the transportation of said ice, [it was by the terms of said contract expressly agreed and understood by and between the parties thereto that said transportation and the carriage of said ice from the city of Galveston to the city of Houston was to be at the sole and exclusive risk of said plaintiffs, and that this defendant was to be in nowise responsible for the safe carriage and transportation of the same; that, at and before the time of the making of said
38 contract, it was expressly stated to said plaintiff by the officers and agents of this defendant, who were then and there acting in its behalf, that it was & would be unsafe to attempt the transportation of such a cargo by any of the barges belonging to said company, and that said company would not take the risk nor assume the responsibility of such transportation; that the said plaintiffs thereupon agreed that, in consideration that the said defendants would undertake said transportation for the low sum of three hundred dollars upon one of the barges of defendant, they, the said plaintiffs, would assume, take upon themselves, and be at all the risk of safe transportation of said ice, and that this defendant should in nowise be liable for loss of said ice or any part thereof during the voyage or during the course of such transportation, but that such loss should fall upon the plaintiff alone, no matter from what cause the same should arise;] [that, with this distinct understanding,] and at the special instance and request of said plaintiffs, defendant chartered and hired to said plaintiffs the said barge Galveston for the transportation of said ice from
39 the said city of Galveston to said city of Houston; all of which occurred at the city of Galveston, on or about the day of July, A. D. 1870. [And defendant says that, in pursuance of the aforesaid understanding,] the said plaintiffs then and there placed upon and loaded said barge with said ice, the weight of which is and was to this defendant unknown; and that plaintiffs then and there placed upon said barge certain ones of their own employees and hired servants to take charge of said ice and see that it was cared for and protected from loss as far as possible during the said voyage, and that said employees, servants, did immediately take charge of said ice, and had the exclusive care and controll of the same during the whole of said voyage. And defendant says that, if any portion of said cargo was lost during the course of its said transportation, by reason of the melting of said ice or otherwise, that the defendant is is in no wise responsible for the same, [by the terms of said contract,] nor did the same occur by reason of the carelessness or negligence of this defendant, but through the fault and negligence of the plaintiffs themselves. And, further
40 answering, defendant says that, if any loss or damage to said ice occur'ed during the time of its said transportation from the city of Galveston to the city of Houston, the same did not occur through any fault, carelessness, or negligence on the part of this defendant; and defendant denies all and every allegation of negligence and carelessness in the transportation of said ice which is laid to its charge in the said petition; and defendant avers that it took all and every care in the transportation of said ice which it was bound to take by the terms of its contracts with said plaintiffs for the transportation thereof, and that, if any loss or damage to said ice occur'ed during said voyage, the same happened from the inherent infirmity of said ice and its nat-

ural tendency to decay and melt, and through the neglect of the said plaintiffs themselves.

That the said ice was laden upon said barge by the said plaintiffs and by their direction, and was stowed to suit themselves, they taking entire and exclusive charge and supervision of said stowage, and directing and controlling the manner in which the said ice should be cared for and protected during its said transportation; and that no employee or
41 agent of this defendant was allowed to exercise any control or supervision over the same at any time during the said voyage; and, if any loss or damage occur'ed to said ice in the course of said transportation, the same happened whilst the said ice was in the exclusive keeping & charge of the plaintiffs, and either by or through the mere negligence & carelessness of said plaintiffs, or through the natural tendency of said ice to melt under exposure to which it was necessarily and unavoidably subjected during said voyage, & this the said defendant is ready to verify. Therefore, he prays judgment against said plaintiffs.

WILLIE & CROSBY,
Atty's for Def'ts.

The special portions of said answer which were excepted to & included in the said demurrer, being all those parts of the foregoing copy of the same which are included in brackets, say commencing at the words, "it was by the terms of said contract," and ending with the words "no matter from what cause the same should arise;" and including also the words "that, with this distinct understanding;" also the following
42 words, "And defendant says in pursuance of the aforesaid understanding;" and also the following words, "by the terms of said contract," coming on to be heard, said demurrer & exceptions were sustained by the court, and the aforesaid portions of the said answer were stri'ken out, to which ruling of the court defendant excepted, and prayed that this his bill of exceptions might be signed & sealed & made part of the record of the cause, which was accordingly done before the jury retired from the bar.

J. C. C. WINCH, [SEAL.]
U. S. Judge, &c.

43 *Bill of exceptions No. 2.—Filed March 1st, 1871.*

GAGE & PARKER
vs.
HOUSTON DIRECT NAVIGATION COMPANY. } Bill of exceptions, No. 2.

Be it remembered that on the trial of the above-entitled cause, before the circuit court of the United States for the eastern district of Texas, at Galveston, the plaintiffs, to sustain the issue upon their part, introduced the following evidence:

They read to jury the act of the legislature of Texas, approved October 9, 1866, entitled "An act to incorporate the Houston Direct Navigation Company," which is as follows:

SEC. 1. *Be it enacted by the legislature of the State of Texas*, That C. L. Longcope, R. J. Willis, J. H. Sterrett, W'm M. Rice, T. M. Bagby, J. R. Morris, S. L. Hohenthal, E. H. Schmidt, L. L. Allen, A. Sessums, and J. L. Latham, their associates and successors, be, and they are hereby, established a body corporate under the name of "The Houston Direct Navigation Company," with authority, in said corporate name, to

contract, to make by-laws for its regulation and government, to sue and be sued, to plead and be impleaded, to grant and sell, purchase and receive, both personal and real estate; to have a corporate
44 seal, and generally to do and perform all such acts and things as may be necessary and proper for or incident to the fulfil'ment of its obligations or the maintenance of its rights under this act, and consistent with the constitution of the State.

SECTION 2. That the organization of said company, already effected, under which C. S. Longcope is president and R. J. Willis is vice-president, and W. M. Rice, J. R. Morris, S. L. Hohenthal, E. H. Schmidt, and A. Lessums are directors, shall be recognized as a legal and valid organization of said company; and said organization shall continue until the first day of July, 1867, when there shall be a new election for president and vice-president and directors, which shall be held annually thereafter.

SECTION 3. Said company, in the administration of its affairs, shall be controlled by a president, vice-president, and five directors, all of whom shall be chosen annually on the first day of July by the stockholders of the company. No person who is not a stockholder in the company shall be eligible to the position of director. The directors shall have power to fill any vacancy that may occur in the board of
45 directors from non-election, resignation, death, or otherwise, and may appoint a secretary, treasurer, and such other officers and agents as they may consider necessary and proper, and prescribe and require bonds for the faithful performance of their duties. They may, if not otherwise determined by the laws, prescribed the manner of conducting all meetings, the number of members that shall constitute a quorum, and *to* do, and cause to be done, all other things and matters, in accordance with law, which they may deem necessary and proper in conducting the affairs of the company. They shall keep, or cause to be kept, accurate records of proceedings of all meetings of the directors and company, and accurate books and accounts of the receipts and expenditures of the company, which shall be open to stockholders. A majority of the board of directors shall have the authority of a full board; and all conveyances, and contracts in writing, executed by the president and countersigned by the secretary, under the seal of the company, and in pursuance of a vote of said directors, shall be valid and binding.

SECTION. 4. That said company is invested with authority to
46 improve the navigation of Buffalo Bayou, by widening and deepening the same, and to improve, by dredging or otherwise, navigation over Red Fish Bar, and over any other bars between the mouth of Buffalo Bayou and Galveston Harbor: *Provided, however*, that nothing herein contained shall be construed to grant said company exclusive right to navigate and improve any of said waters; and provided, further, that the improvement of the navigation of said waters shall at all times be subject to the control of such State engineers as hereafter may be appointed.

SECTION 5. That the capital stock of said company shall be one hundred and fifty thousand dollars, to be divided into shares of five hundred dollars each. Each share shall entitle the owner to one vote at the meetings of the company, the ownership of the original shares to be determined by the exhibit of the certificate, duly assigned, if not in the hands of the first holders, or proof of their ownership. Said company is authorized to increase its capital stock to one million of dollars, as may be required by the increasing demands of commerce, and no one shall

be considered a stockholder until full payment of share or shares
47 taken by him shall have been paid in by him.

SECTION 6. That said company shall have power to dispose of the shares in said capital stock in such number and on such terms as it may deem best for the interest of the company. Any agreement in writing, whereby any one shall become a subscriber for stock may be enforced against him according to its terms, and all contracts made by the company shall be in writing and executed in such form as the by-laws of the company may prescribe.

SECTION 7. That said company shall have power to borrow money on their bonds, provided three-fifths of the directors shall vote for the same, and to secure said bonds by mortgage on the steamers, propellers, barges, and wharves of the company, the borrowing to be at such a rate of interest as the directors may determine.

SECTION 8. That a vote of the stockholders, representing two-thirds of the stock, shall be sufficient at any time to remove any board of directors and appoint others in their stead, provided, that any meeting for such a purpose shall only be called by a notice to that effect, published for four successive weeks in a newspaper printed in the city of
48 Houston, and signed by one-fourth of the stockholders.

SECTION 9. That the principal office of said company shall be located in the city of Houston.

SECTION 10. That the company shall, within six months after the passage of this charter, through the legislature, have, on the waters of Buffalo Bayou and of Galveston Bay and Harbor, a sufficient number of steamers, barges, and propellers to meet the demands of commerce on said company, and they shall be subject in the transportation of freight to the laws applicable to common carriers.

SECTION 11. That the president and directors of said company shall, in accordance with the laws to be passed for that purpose, annually or semi-annually divide among the stockholders thereof so much of the profits of the company as in their discretion they shall deem safe, but no dividen's of any of the profits shall be made unless the capital paid in remain' unimpaired.

SECTION 12. The officers of said company shall, during the month of June, in each year, cause a full and accurate statement to be made out, which shall be signed by the president and secretary and submit-
49 ted for the inspection of the stockholders at their annual meetings.

SECTION 13. The rates of freight transported by the company, to include every charge of every description, shall be entered on through bills of lading, so as to enable the planters to ascertain before shipping the exact amount of all charges on freight to the point of destination by referring to his bill of lading.

SECTION 14. The president and vice-president shall each vote as director in all meetings of the board of directors.

SECTION 15. That this corporation is hereby invested with all the rights and powers necessary to the accomplishment of its chartered objects; but nothing herein contained shall be constructed into enabling it to exercise banking privileges.

SECTION 16. This act to take effect from its passage.

Passed Oct. 9th, 1866.

50 Plaintiff introduced EDWARD E. PARKER, who was a member of the firm of Gage & Parker, pl'ffs in this cause.

That, in July, 1870, he applied to Mr. Aiken, agent of the def'ts at Galveston, to have some ice carried by boat from Galveston to Houston. Mr. Aiken told Parker they had no suitable vessel, and declined to take

it. Witness then mentioned a barge of def'ts lying at the wharf at Houston, called the "Ark," and asked if he could get that. Aiken replied she was not seaworthy, and he would not risk her on the voyage. The Ark had sides and roof, and would protect the ice; this was the reason why he wanted her. Some time afterwards Aiken informed him that another barge, the "Galveston," was down from Houston, and witness was informed he might have her. She was not a covered barge, but that he, Aiken, let him have some tarpaulins to cover his ice with. Witness agreed to take the barge and pay three hundred dollars, and, by the terms of the contract, the def'ts were to tow the barge to Houston by one of their steamers. On the same day, 26th July, 1870, about
11 o'clock a. m., pl'ff sent hands and commenced loading barge
51 from brig Valencia, in which the ice had been brought from the north, and worked so loading until the evening of the next day, including the night, excepting during intervals of rain, which occurred repeatedly during such lading. During such lading witness sent to Aiken for tarpaulins; did not get them. Aiken gave evasive answers, such as that he was too busy, and so evaded two or three times. At one time said they had no tarpaulins, but he would telegraph to Houston for them, & that he had done so, but they had not arrived, which he, Aiken, regretted. The demand for tarpaulins was made repeatedly by witness after lading of the barge commenced, and before rain commenced, but he could not get them. Witness protected the ice as well as possible with hay and saw-dust taken out of the brig. A tier of bales of hay was placed around the outside of the ice upon the barge, by witness, but the covering at hand and used was not sufficient to protect the ice. One Harry Whalen, in the employ of the company, had charge of the barge as barge-master. He did not assist in loading the ice, but directed how the ice should be placed on the barge. The barge,
when loaded, was attached to the stern of the steamer Whitelaw
52 so closely that a person could step from one deck to the other, and so towed to Houston. It rained a great deal and very hard during the trip. There was tarpaulins on board the Whitelaw. Witness applied for them to the mate of boat; they were not then in use. Was told he could not have them, for they were wanted to cover other freight. The ice melted very rapidly, owing to its exposure to the rain, not being properly protected. Witness protected the ice as well as possible, during the trip, with hay and saw-dust; but these do not protect ice as well as tarpaulins; tarpaulins would have afforded a good protection against the rain. Def't did nothing to protect the ice from the weather during the voyage. Witness had three hands on barge and boat during the trip, besides himself, some of the time on barge, & some of time on boat. Took them up to unload ice in Houston. Applied for suppers for men; it was given them. Paid no fare for himself or men, though he offered so to do; but pay was refused. Arrived in Houston on the 28th July, about daylight. About sunrise commenced unloading ice; so continued during day; suspended at night. Resumed on Tues-
day morning, and finished about 9 a. m. Had eight or ten
53 drays engaged during the time; each dray would carry 5 or 600 lbs. of ice. The distance to the ice-house from the barge was 2 or 300 yards. Not more than 25 or 30 tons of ice delivered at ice-house. Witness has been engaged in ice business several years; is a good judge of weight and amount of ice in bulk. The brig started from Boston to Galveston with 256 tons of ice. At that season of the year the loss would be about ⅛ by natural melting. Witness was of opinion that 135 tons of ice were loaded on barge. On such a trip from Galveston to

Houston the loss from melting, if properly protected, will not be over ten per cent. Witness did not weigh ice when loaded, or when it arrived in Houston; judged of quantity by the bulk. Has sold some of the ice at 4 cents, and closed out the last as low as 3 to 3½ cents, per pound, coin; that these sales were by 10, 20, & 30 lbs. That ice was not marketable in Houston by the cargo, and he could not tell what a whole cargo would be worth there, but if so sold it would be cheaper than in smaller quantities. Perl & McDonald were manufacturing ice at that time in Houston; may have sold as low as 2½ cents, per
54 pound; did not know at what price they sold ice. That the loss to said ice from not being properly protected from the rain was at least from 85 to 90 tons. On arrival at Houston, witness saw Mr. Shearn, the president of the company, and told him as the ice suffered such a great loss, that he, Shearn, ought to make a rebatement of freight, or part of it. Mr. Shearn told him that if it was an individual matter of his he would do so, but he was acting in an official not an individual capacity, & could not do so. Witness was then introduced by Mr. Shearn to the ag't of the company at Houston, and paid freight, took receipt in words and figures as follows:

"D. E. CONNOR, *Master.*] JULY 27TH, 1870.

"*Messrs. Gage & Parker, to steamer J. H. Whitelaw, barge Galveston, & "owners, Dr.*

"For freight on 1 barge load ice..... $300 00

"Paid by check on 1st Na'l Bank, Galveston.

"G. L. PORTER, *A'gt.*"

Genuineness of receipt admitted by def't's counsel.

Pl'ffs also introduced CHARLES FOWLER, who testified he is
55 agent, at Galveston, of the Morgan line of steamers running from New Orleans to the ports of Texas. That when ice was received by that company upon barges it was customary to protect it with tarpaulins; that tarpaulins formed the best protection that could be furnished to ice shipped in such an exposed vessel; that such protection was usual in shipping all freight which would damage by being exposed when shipped in an exposed condition upon open vessels, so far as he knew.

Pl'ff then introduced JOHN BROWN, who testified: He assisted to load the barge Galveston. When they commenced they placed at one end of the barge several tiers of ice, one upon another, when the bargeman, Whalen, interfered, and told the hands loading it was not the right way to put the ice on barge; and, when they insisted in so loading, he told them he had charge of the barge, and they should load as he directed, & compelled them to lay a single tier all over the deck inside the bales of hay; that if they had been permitted to load the barge in their own way there would not have been so great a loss, or the ice, while loading, could have been more easily protected from the rain. They loaded
56 ice on the barge all the afternoon of the 26th, and during the night, except when it rained, and the next day, the 27th, until about 4 o'clock, when the Whitelaw took the barge in tow, and started for Houston. Witness went along. The bargeman, Whalen, was in charge of the barge during the whole trip, except when he went on board the steamer Whitelaw to get his meals. It rained a great deal

during the trip. The ice was not covered except with hay, saw-dust, and shavings, which the rain went through and washed off. Helped unload barge in Houston. Commenced about 7 o'clock on 28; worked during day; left off at night; resumed next morning, and finished about 9 a. m. Witness is not acquainted with ice business, & cannot estimate amount loaded on barge, or delivered in Houston, but knows a very large amount of the ice was melted down by the rain on the trip from Galveston to Houston, and while loading in Galveston.

Pl'ff then introduced HENRY BEIRMAN, who testified, in substance, what was testified by previous witness: That he was acquainted with the ice business. Had followed it several years. Could form a very accurate estimate of a given quantity of ice by looking at it. That there
57 was between 130 and 135 tons of ice loaded on barge, and not more than 25 or 30 tons of it when delivered at ice-house in Houston. Witness applied to Mr. Aiken for tarpaulins. Was told they were in warehouse, but did not send them. Some of the ice delivered in Houston was sold as high as four cents, specie, per pound to the saloons, and taken in quantities under fifty pounds, say 10, 20, 30, or 40 lbs. Some of the ice was sold when closing out from 3 to 3½ cents per pound. The loss of the ice, if it had been properly protected, would have not been greater than ten per cent. That the loss occurred from being melted down by the rain after it was put on barge, it not being properly protected by covering. Witness has been in the employ of McGill in the ice business for several years. That McGill had often shipped ice from Galveston to Houston, when properly protected, at a loss not to exceed seven per cent. When the barge came alongside the brig to be loaded witness asked captain *of* in charge of boat for tarpaulins, as the weather looked threatening. The captain said they would be sent aboard. Heard Parker ask mate of steamer while en route for
58 tarpaulins to cover ice, as it was being melted down. He was refused on the ground that they were wanted to cover other freight on boat. The tarpaulins were not in use at that time. Whalen was in charge of the barge on the trip.

Pl'ff next introduced Mr. HUNTER, who testified:

He did not assist loading ice on barge, but did take balance of ice out of brig after the barge left, immediately, and took it to pl'ffs' ice-house in Galveston. This ice-house was 6 or 700 yards from brig. Had, most of the time, 4 drays employed. Some of the time but 2 drays employed. There was only about 14 tons so hauled from the brig. Not exceeding that amount. The def'ts on several occasions took ice from Galveston to Houston for McGill, and the loss never exceeded ten per cent.; usually from 7 to 10 per cent.

Pl'ff here rested his case.

To sustain the issues on their part the def'ts introduced S. P. CHRISTIAN, who testified:

He is commander of steamer Bagby, one of def'ts boats. Was present when Mr. Parker came to see Mr. Aiken about transporting ice to Houston. Aiken said to Parker he had no barge he was willing
59 to risk on such a trip. Parker said there was a house-barge belonging to the company which would suit him. Aiken said this barge was lying at Houston and unseaworthy. Mr. Aiken, Mr. Shearn, pres't, witness, & Mr. Parker were present. Upon consultation, it was decided it would not do to risk the "Ark." Witness then went away.

Knew the barge Galveston well. When loaded she would carry two hundred tons, and draw nearly six feet of water. With 135 tons she would draw about five feet. Had frequently towed barges of ice to Houston. Sometimes they were covered with tarpaulins; sometimes with hay & saw-dust, the latter taken from the vessel with the ice. The latter was the customary and usual way of protecting the ice whenever ice has been shipped by this company. Owners of the ice have always, so far as known to witness, taken care of it, and the boat hands or employees of the company have had nothing to do with it, except to have general charge of the boats and barges.

Defendants next introduced JOSEPH AIKEN, who testified that
60 he was agent of defendants, at Galveston, and had been for several years. That Mr. Parker, of firm of Gage and Parker, Galveston, came to my office sometime in July last, to charter a barge to take ice to Houston from brig Valencia off Kuhn's wharf. Told him we had no barge fit for the purpose, as the cattle-pens had been removed from our barges, and only one barge, the Ark, of Houston, was fit for the purpose, having a house built on her, but at that time was not in a state of repair to come across the bay; needed caulking, &c. Mr. Parker said: "Let me have her and I'll run all risks, and pay for any damages to barge and for the barge itself if lost." Ascertaining from Houston that *that* the barge Ark could not come down, another barge, the Galveston, was sent down, and on her arrival I informed Mr. Parker, who took charge of said barge and put his own men on board, to load the ice properly. Harry Whalen was bargeman on the barge Galveston, in the employ of our company by the month. When barges were let out on contract his
61 duty was simply to see that the barge was not abused or loaded improperly and strained. When the barge was loaded Whalen came to the office and asked me if there were any tarpaulins down. I told him there were some in the warehouse, and to tell Mr. Parker to send his men for them at any time. Steamboat J. H. Whitelaw took the barge Galveston in tow that evening and landed her alongside the wharf at Houston early next morning; something unusual, as barges are frequently 3 or 4 days in getting to Houston. Barge Galveston had about ten tons of railroad iron on board, which had been put aboard at Houston to give her a list in caulking, and was not removed, but came down and went back with the barge. No freight was charged on this iron. 'Tis not customary to cover ice with tarpaulins but to use saw-dust, which comes out with the ice from Boston. The company never had taken any ice from Galveston to Houston upon their own risk, but always at the risk of the shipper. They considered it as too unsafe and
62 risky a business. Whenever ice was taken it was always upon a chartering of a barge for that purpose to the shipper, he paying so much for the barge, and the company towing it for him to Houston. The shipper took the barge and had the exclusive use of her for the voyage; loaded her, sent his hands with her, and protected & cared for the ice as he pleased. For this reason, & more especially because the company were to be at no risk in such cases, barges were always hired to shippers of ice for much less than when they were freighted by the company with an ordinary cargo. With an ordinary cargo, *ordinary cargo*, a barge like the Galveston usually paid from 6 to 800 dollars per trip from Galveston to Houston. Witness let plaintiffs have it on this occasion for about one-half its value, because of the reasons above stated. Other articles of a dangerous or risky character were sometimes carried on barges, but always at the risk of the shippers, and at small rates. This was a universal custom with the company. Witness states further that, in speak-

ing with Mr. Parker about the tarpaulins, "I merely offered them to
63 him as a loan for his own accommodation, and did not understand this to form any part of the contract. The tarpaulins were in the warehouse subject to his order, and supposed that he would send for them. I never refused to let him have them."

The defendant then introduced D. CONNOR, who stated that he was master of the steamer Whitelaw at the time she towed the said barge Galveston from Galveston to Houston, last July, with the cargo of ice belonging to plaintiffs. The trip was made within the usual time of making a voyage from Galveston to Houston; say from about sundown Tuesday evening to daylight Wednesday morning. It rained off & on during the voyage. None of the hands of the boat were on board the barge, nor had anything to do with taking care of the ice. It was exclusively in charge of plaintiffs' hands. These hands were charged no passage. Mr. Parker said to him at supper-time that his men had nothing to eat, and witness directed supper to be furnished them on the steamer. Harry Whalen, an employee of the defendant, was on
64 the barge, but not for the purpose of taking care of the ice, but to see that the barge received no damage during the trip. He acted in the capacity of watchman of the barge. Witness had towed up other barges with ice, and the owners of the ice always took care of it themselves. It was usually protected by a covering of hay or sawdust alone. There might have been instances when it was covered tarpaulins, but such covering was not usual. The owner of the ice always took charge of it and protected it as he pleased.

Defendant then introduced HARRY WHALEN, who said that he was the person who was on the barge Galveston at the time the ice of plaintiffs was transported on her from Galveston to Houston. He was placed there as a watchman by the Direct Navigation Company to see that the barge received no damage. He had nothing to do with the cargo or the loading of it, except that it was so placed on the barge that she would be properly trimmed & receive no damage from it; that he had been in the company's employ, and in this business, on board the barge
65 Galveston, for a long time. Knew all about the barge & her capacity. Loaded with 135 tons, she would draw about 5 feet. When she was loaded with plaintiffs' ice, on this occasion, ready to start on her voyage, she only drew about 3 feet 9 inches, and could not have had more than 80 or 90 tons on board of her. He bailed her during her voyage to Houston, & when she arrived there she had lightened about 5 inches, & could not have lost more than 40 tons. When the barge started on said voyage she had upon her ten tons of railroad iron, which had been placed upon her for the purpose of listing her when she was being caulked, and was not carried as freight; she also had on her some ten or fifteen tons of hay, used in covering the ice. When the barge was loaded something was said about tarpaulins to cover the ice, and "I was sent by Mr. Parker, or some of his men to ask Mr. Aiken for tarpaulins. I went to Mr. Aiken & asked him about them, and he replied that there were some in the warehouse, & to tell Mr. Parker to send for them when he wanted them, or something to that effect. This
66 message I delivered." Does not know whether Mr. Parker sent for them or not. He afterwards said that he would get some hay to cover the ice, and witness afterwards went with him to Brown & Lang's, where Mr. P. bought a large quantity, & sent it down & had his ice covered with it on the barge. It rained a good deal during the first night they were loading the barge and on the voyage from Galveston to

Houston, and a large quantity of the ice was melted on the way. Mr. Parker & three men went along with the boat and barge, and, he understood, in charge of the ice. Plaintiff and his hands were sometimes on the barge trying to protect the ice and sometimes on the steamboat. The trip from Galveston to Houston was made in about 12 hours, which was very quick for a barge in tow to make the voyage, and no accident of any kind occurred on the way. He was present at the loading of the ice on the barge. It was done entirely by plaintiffs' hands. Neither witness nor any of the defendant's employees had anything to do with the loading. The barge was taken alongside of the Valencia for
67 convenience in loading. They commenced putting on the ice Monday evening. They commenced by putting the ice one piece upon another at the end of the barge. He told them not to load the barge in that way, but first to place one layer of ice all over the barge and then a second layer upon this, & so on, otherwise and especially if they loaded it as they commenced the barge would be strained & injured. His object was to protect the barge and not to interfere with the protection of the ice. Witness further stated that the ice which was loaded upon the barge by the plaintiffs was soft ice, having a great deal of snow mixed with it, and such ice has a greater tendency to melt than where the ice is solid & unmixed with snow. Witness is unable to state how much water the barge drew on the morning of the 25th July; only knew how much she drew when loaded ready for her trip to Houston.

The defendant next introduced W'M MORRISON, who testified as follows: Mr. Parker (of Gage & Parker) came to the H. D. Nav. Co.'s office to hire a barge to carry ice to Houston. He could not get one that
68 day, all being employed. He was very anxious to get a barge, as his ice was on hand and melting, and he was willing to take all risks & expenses upon himself, & to fit the barge for carrying ice, by putting up a fence round it, or otherwise. The next day a barge came down and it was offered to him on these terms, he paying a fixed price for the use of the barge & the towage of it to Houston. He took the barge, and was to have with it some tarpaulins to protect the ice, which were lying in the warehouse, which they could have by going for them. The barge was loaded by his men and towed to Houston by def't. After that I heard nothing of the matter, till one day, some few weeks after, I met Mr. Parker on the central wharf. He stopped to talk & said the Nav. Co. had gone back on him, and were taking their ice for the boats from Lewis because they sold cheaper, but they would not make anything out of it. He was going to make them pay for the ice that melted on that barge, and would get even with them anyhow.

69 Defendant then introduced JOHN SHEARN, who testified as follows:

I am president of the Houston Direct Navigation Company. Was in Galveston in July last, and present when Mr. Parker, one of the plaintiffs, called to see Mr. Aiken about having a barge to take his ice up to Houston. Heard the conversation between them. Mr. Parker wanted to get the barge with a house built upon it called the Ark, but Mr. Aiken told him, and so did I, that we were unwilling to let him have that barge, because it was out of repair, and not able to make the trip. Mr. Parker insisted upon getting it, and seemed more anxious to get a barge than I ever saw one before. He said his ice was on the Valencia and melting, & he must have a barge to take it to Houston. I turned

to Capt. Christian and asked him if he thought the Ark would do to risk, & he answered that she would not. Mr. Parker then said if we would let him have the barge, he would be at all the risk of the ice and of the barge, & would pay for the latter in case it was lost, but we declined to let her go under any circumstances. It was not the custom of the company to
70 transport ice at their own risk. Whenever ice was taken they always chartered to the owner a barge, which he was to load himself, & he was to take care of the ice on the way, and if any loss occurred it was to fall on the shipper, & such I understood to be the terms on which Mr. Parker proposed to take the "Ark." I was at Houston when the barge arrived with the ice. My office is near the landing, and I can see all that transpires in loading & unloading vessels at the landing. Mr. Parker was engaged from Wednesday morning about sunrise until Thursday morning at 9 o'clock in unloading the barge, & had at least ten drays constantly running between the landing and the ice-house, to which the ice was carried, which was some 2½ blocks, or about 2 or 300 yards off. A dray-load in Houston is 5 or 600 lbs. I am a resident of Houston. Bought ice there last summer about the time this cargo arrived for 2½ cts per lb. from Perl & McDonald, who delivered it to me in small quantities for my family use. I considered this the value of ice there at that time.

71 When the barge arrived at Houston Mr. Parker came to me and said that he thought I ought to make some reduction in the price of the barge, because he had lost so much of his ice by melting on the way. Said his loss in this way would amount to five hundred dollars.

Plaintiffs then, in rebuttal, recalled EDWARD E. PARKER, who testified as follows:

When I first applied to defendants for transportation for my ice, they said that they then had here no vessel fit to freight the ice on that was seaworthy. I then asked them about the house-barge called the "Ark," which is a barge with a roof on it, and they replied that she was not seaworthy. I then told them that if they would take my ice on her that I would run all risk and be responsible for all loss, for I wanted my ice transported in a covered vessel, but they said she would not do, and refused to let me load her with the ice. The next day Mr. Aiken informed me that the barge called the Galveston had arrived here, and that I could load her with ice, and that they would furnish tarpaulins to cover it with, and convey it to Houston for three hundred dollars. I never agreed to be responsible for any loss by the Galveston, and no
72 such proposition was ever made. It was the Ark that I said I would be responsible for the loss on. Nor did I agree that myself and men were to have control of the barge and ice. I agreed that my men should load the barge, and the company were to transport the ice, and protect it by tarpaulins. Neither myself or men had any control over the barge or ice, and assumed none, but the defendants were in the possession of and control of the barge exclusively all the time, from the time I commenced delivering the ice on board of her until her arrival in Houston, and Mr. Aiken did promise to furnish some tarpaulins to cover the ice, but he wholly failed to furnish any. And when I went to him and demanded or requested the tarpaulins, he said they had not arrived, although he had telegraphed for them, & that he regretted it very much. Mr. Parker here presented the following writing, which is read in evidence to the jury, to wit:

"GAGE, PARKER & CO.:

"We have a flat barge, the 'Galveston,' here this morning
73 which you can have to load with ice. You must build the inclosure, and we will let you have some tarpaulins to cover it. Price, $300.

"J. AIKEN, *Ag't.*"

When Mr. Aiken contracted with me to freight my ice to Houston on the barge called the "Galveston" for three hundred dollars, freight money, and to furnish tarpaulins for it, no person was present but Mr. Aiken and myself, and I never agreed to assume any risks whatever in relation to the matter. The conversation which I had on the previous day, when Mr. Shearn & Capt. Christian were present, had reference exclusively to the covered barge called the "Ark." The barge called the "Ark" had a house on her which would have afforded perfect protection, & I was willing to take all risks on her. I never agreed to take any risks in regard to the barge "Galveston," and no such conversation ever took place relative to the barge "Galveston." My ice which I shipped on the barge "Galveston" was solid and hard and in good condition when the defendants received it for shipment.

The defendants had several barges and steamers on their line
74 between Galveston & Houston continually in use by them in carrying freight between said two cities. I purchased several bales of hay, and made the enclose on the barge with it.

Signed and sealed this day of February, 1871.

J. C. C. WINCH, [SEAL.]
U. S. Judge, &c.

75 *Bill of exceptions No. 2 cont'd—Filed M'ch 1st, 1871.*

Bill of exceptions No. 2 continued.

In the circuit court of the United States for the eastern district of Texas. December term, A. D. 1870, at Galveston.

CHARLES GAGE AND EDWARD E. PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY.

And be it further remembered that, after said testimony was closed, the Honorable J. C. C. Winch, who presided alone in the trial of said cause, instructed the jury that the defendant, being a common carrier,
76 could not, by the laws of Texas, limit or restrict its common law liability in any manner whatever, where the cargo was to be carried on waters entirely within the body of this State.

That defendant was liable in the present case for all losses accruing to the ice except such as happened by the act of God, the enemies of the country, or through loss resulting directly from the inherent infirmity of the article carried.

That if the barge was hired by plaintiffs from defendant, and by the same contract was to be towed by one of defendant's steamers, it was not such a chartering of the barge as relieved defendant from its common-law liability for all losses that might occur to the ice, except such as happened through the act of God, or the public enemy, or the inherent infirmity of the article carried.

That the fact that the open and exposed character of the barge was known to the plaintiffs at the time they agreed to ship their ice upon it would not release defendant from his said responsibility as a common carrier.

That if the jury believe that defendants' agent, by the terms of said contract, promised to let plaintiffs have tarpaulins to cover his ice
77 when placed upon the barge, and afterwards refused to let them have such tarpaulins, and that the loss of the ice was caused by the want of such covering, then the defendant is liable for such loss. It was the duty of def'ts, being common carriers, to protect all property shipped in a proper manner, considering the nature of the article shipped, and if any loss occurred through failure or negligence on the part of def'ts to so protect the property, the plaintiffs are entitled to recover for such loss, and that in assessing the amount of damages which the plaintiffs are entitled to recover, if any, the jury will first ascertain the amount of ice loaded upon the barge; they will then ascertain the amount delivered to plaintiffs at the end of the voyage, and the amount which the cargo of ice would lose from natural decay & infirmity on such a trip; these two latter amounts they will deduct from the former, and the remainder, if any, will be the amount of ice for which the plaintiffs are entitled to recover. Then, to ascertain the amount of damages, if any, they will determine from the evidence what said amount of ice was worth in Houston at the time of the ar-
78 rival there of said barge & its cargo, & return their verdict accordingly.

To which charges of the court the said defendant excepted before the jury retired from the bar.

And be it remembered further that defendant's counsel thereupon asked the court to charge the jury as follows:

Charges asked for defendant.

GAGE & PARKER }
v. }
H. D. NAV. CO. }

Defendant's counsel ask the court to charge the jury that if the owner of the ice specially undertook to watch it, and sent their own servants with the ice, no liability attached to the defendant.

That if the ice was stowed upon the barge by the plaintiffs, or with their consent, the defendant is not liable for any loss that occurred by reason of the ice being thus stowed.

That if the open structure of the barge was well known to the plaintiffs at the time they delivered it upon board, it creates an implied exception in favor of the carrier, & he is not liable for damages caused by rain.

WILLIE & CROSBY,
Att'ys for Def't.

79 Which charges were refused by the court, and were not given to the jury.

To all of which action of the court, set forth in this bill of exceptions No. 2, the said defendant, by its counsel, excepted, and prayed that this, its bill of exceptions, might be signed, sealed, and made part of the record in the cause, which was accordingly done before the jury retired from the bar.

J. C. C. WINCH, [SEAL.]
U. S. Judge, &c.

Bill of exceptions No. 3.—Filed Feb'y 17th, 1871.

Bill of exceptions No. 3.

In the circuit court of the United States for the eastern district of Texas. December term, A. D. 1871, at Galveston.

CHARLES GAGE & EDWARD E. PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY. } 430.

Be it remembered that, on the trial of this cause, the defendant's motion for a new trial coming on to be heard, which said motion is as follows:

GAGE & PARKER
v.
HOUSTON DIRECT NAVIGATION COMPANY.

In circuit court of United States for eastern district of Texas.
80 December term, A. D. 1870, January 21, 1871.

And now comes the defendant in the above-entitled cause, and moves the court to grant it a new trial therein for the following reasons:

1. Because the court erred in sustaining plaintiffs' exceptions to defendant's first & second amended answers, and defendants were thereby deprived of the privilege of introducing testimony under the portions of said answers which were thus excepted to. No testimony was excluded on trial.

2. Because the court erred in its charge to the jury.

3. Because the court erred in charging the jury that, under the circumstances of this case, the defendant was liable for all losses occurring to the ice which did not occur through the act of God, or the public enemy, or inherent infirmity of article shipped by pl'ffs, & was also liable for all loss which occurred from his negligence, or from want of proper protection to the ice shipped while in his charge.

4. Because the court erred in refusing the charges asked by the defendants.

5. Because the jury found contrary to the law of the case.

6. Because the jury found contrary to the evidence.

81 7. Because the verdict of the jury is unsupported by the evidence.

8. Because the verdict of the jury was excessive, & the amount of damages found by them was beyond that proved upon the trial.

9. Because the jury neglected, through inadvertence, to make proper calculations as to the amount of ice lost during the voyage.

10. Because the verdict was given against the law, evidence, & charge of the court.

WILLIE & CROSBY,
Att'ys for Def't.

The said motion was by the court overruled, & a new trial refused; to which action and opinion of the court overruling said motion & refusing a new trial defendant, by its counsel, excepted, & prays that

this bill of exceptions may be signed, sealed, & made part of the record in the cause, which is accordingly done.

J. C. C. WINCH, [SEAL.]
U. S. Judge, &c.

Bond for writ of error.—Filed Feb'y 21, 1871.

Know all men by these presents that we, The Houston Direct Navigation Company, as principal, and John Shearn and Frederick A. Rice, as sureties, are held and firmly bound unto Charles Gage and
82 Edward E. Parker in the full sum of eight thousand one hundred and sixty dollars, lawful money of the United States, to be paid to the said Gage and Parker, their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators and successors, jointly and severally, by these presents, sealed with our seals, and dated this 17th day of February, A. D. 1871:

Whereas, lately at a term of the circuit court of the United States for the eastern district of Texas, holding its sessions in the city of Galveston, in said State, in a suit depending in said court between the said Charles Gage and Edward E. Parker, plaintiffs, and the said Houston Direct Navigation Company, defendant, judgment was rendered against the said defendant and in favor of the said plaintiffs for the sum of four thousand and eighty dollars, and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Gage and Edward E. Parker, citing and admonishing them to be and appear at a Supreme Court of
83 the United States of America, to be holden at the city of Washington on the first Monday of December next:

Now, the consideration of the above obligation is such that if the said Houston Direct Navigation Company shall prosecute its writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

The word "eighty" erased on first page before signing.

In testimony whereof the said Houston Direct Navigation Company has heretofore caused this bond to be signed by its president, and countersigned by its secretary, and has affixed thereto its corporate seal, and said sureties have set their hands and scrolls by way of seals this the 17th day of February, A. D. 1871.

{ SEAL OF THE COMPANY. }

JOHN SHEARN,
Pres'd't H. D. N. Co.
R. GREENE, J'R,
Secretary H. D. N. Co.
JOHN SHEARN. [SEAL.]
F. A. RICE. [SEAL.]

Bond examined and approved.

J. C. C. WINCH,
U. S. Judge.

84 *Writ of error.—Filed Feb'y* 17, 1871.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because, in the record and proceedings, and also in the rendition of

the judgment of a plea which is in the said circuit court before you, between Charles Gage and Edward E. Parker and The Houston Direct Navigation Company, a manifest error hath happened, to the great damage of the said Houston Direct Navigation Company, as by its complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceed's aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme
85 Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 17th day of February, in the year of our Lord one thousand eight hundred and seventy-one, with the seal of the circuit court of the United States for the eastern district of Texas, in the fifth circuit.

[SEAL.] LEVI JONES,
Clerk U. S. Circ't Court, Eastern Dist. of Texas, at Galveston.

Allowed by—

J. C. C. WINCH,
U. S. Judge, &c.

Copy of writ of error.—Filed Feb'y 18th, 1871.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles Gage and Edward E. Parker and The Houston
86 Direct Navigation Company, a manifest error hath happened, to the great damage of the said Houston Direct Navigation Company, as by its complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceed's aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 17th day of February, in the year of our Lord one thousand eight hundred and seventy-one, with

87 the seal of the circuit court of the United States for the eastern district of Texas, in the fifth circuit.

[SEAL.] LEVI JONES,
Clerk U. S. Circ't Court, Eastern Dist. Texas, at Galveston.

Allowed by—

J. C. C. WINCH,
U. S. Judge, &c.

I, Levi Jones, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing to be a true and correct copy of the writ of error to the Supreme Court of the United States, sued out by defendants in the cause lately pending in said court, entitled Gage & Parker v. The Houston Direct Navigation Company, as the same now appears on file in my office; to certify which, witness my hand and seal of said court, at Galveston, February 18th, 1871.

[SEAL.] LEVI JONES,
Clerk U. S. Circ't Court, E. D. T., G.

Original of the above copy endorsed as follows, viz:

"The Houston Direct Navigation Company, plaintiffs in error, v. Charles Gage & Edward E. Parker, def'ts in error. Copy of
88 writ of error. Original endorsed as follows, viz: Filed Feb'y 17th, 1871. Levi Jones, cl'k. This copy deposited in the clerk's office of the circuit court, east. dist. Texas, at Galveston, for defendants in error, Feb'y 18th, 1871. Levi Jones, cl'k."

Citation to Supreme Court U. S.—Issued Feb'y 17th, 1871.

UNITED STATES OF AMERICA, *ss:*

To Charles Gage and Edward E. Parker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein The Houston Direct Navigation Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand eight hundred and seventy-one,
89 with the seal of the circuit court of the said United States for the eastern district of Texas, in the fifth circuit.

[SEAL.] J. C. C. WINCH,
U. S. Judge.

Marshal's return.

Received this writ on the 17th day of February, 1871, and executed on the 22d day of March, 1871, by delivering to William H. Stewart, attorney of record for the within defendants in error, at Galveston, in

my district, a true copy of this writ, at the same time exhibiting to him this, the original writ, with the signature of the judge and the seal of the court thereto affixed.

W'M. C. PARKER,
U. S. Marshal E. District Texas.
Per J. G. BURNHAM,
Deputy.

Sworn to and subscribed before me March 22d, 1871.

LEVI JONES,
Clerk U. S. Circuit Court, E. D. T., G.

The foregoing original citation endorsed thus: "The Houston Direct Navigation Co., plaintiff in error, v. Charles Gage & Edward E. Parker, def'ts in error. Citation to Supreme Court U. S. Returned and filed March 22d 1871. Levi Jones, clerk."

90 UNITED STATES OF AMERICA,
Eastern District of Texas:

I, Levi Jones, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing 89 pages of writing to contain a true and correct transcript of all the record and proceedings in the cause lately pending in said court, entitled "Charles Gage and Edward E. Parker v. The Houston Direct Navigation Company," and numbered on the law docket thereof No. 430, as the same now appear in my office.

To certify which, witness my hand and seal of said circuit court, at Galveston, April 10th, 1871.

[SEAL.]

LEVI JONES,
Clerk to U. S. Circ't Court, E. D. T., G.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles Gage and Edward E. Parker, and The Houston Direct Navigation Company, a manifest error hath happened, to the great damage of said Houston Direct Navigation Company, as by its complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceed's aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held; that the record and
92 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 17th day of February, in the year of our

Lord one thousand eight hundred and seventy-one, with the seal of the circuit court of the United States for the eastern district of Texas, in the fifth circuit.

[SEAL.] LEVI JONES,
Clerk U. S. Circuit Court, Eastern Dis't Texas, at Galveston.

Allowed by—

J. C. C. WINCH,
U. S. Judge, &c.

(Indorsed:) The Houston Direct Navigation Company, plaintiff in error, v. Charles Gage & Edward E. Parker, def'ts in error. Writ of error. Filed Feb'y 17, 1871. Levi Jones, cl'k.

(Indorsement on cover:) No. 391. The Houston Direct Navigation Company, plaintiff in error, vs. Charles Gage & Edward E. Parker. E. Texas, C. C. U. S. Filed 21st November, 1871.